In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1599

COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, a voluntary association, and DONALD PAULL and RUTH NEDELSKY,

Petitioners,

vs.

MILTON B. BYRD, ROBERT L. RANDOLPH, IRWIN J. SULOWAY, CARL A. CLARK, and BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, a body corporate and politic of the State of Illinois,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion below of the United States Court of Appeals for the Seventh Circuit is reported at 456 F.2d 882, and is reprinted, with certain typographical errors, in the appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-petitioners* were two college instructors at Chicago State College (College) suing individually and a union* suing only in a representative capacity on behalf of all faculty of the College. Defendants-respondents are administrators at the College (now Chicago State University) and the board which governs the College. Ill. Rev. Stat. 1971, ch. 144 §1001.

Petitioners were probationary instructors and had not yet achieved tenure. Under state law, their contracts and custom and practice at the College, petitioners had no right to continued employment beyond the expiration of their year-to-year teaching contracts. Respondents decided not to renew their teaching contracts beyond the academic year 1970-71.

Petitioners alleged that they were denied reemployment in retaliation for the exercise of speech and associational activities protected by the First Amendment to the United States Constitution. Respondents denied that any of petitioners' speech or associational activities influenced the decision not to reemploy them. Instead, respondents stated that they applied customary and constitutionally permissible criteria relating to petitioners' competence in making their decisions.

After hearing evidence for four days and oral argument for one-half day, the district court found that respondents did not act on the basis of petitioners' speech and associational activities in deciding not to reemploy them, but rather applied customary criteria relating to petitioners' competence as teachers. These reasons are set forth in

* As used herein, "petitioner" refers to the individual plaintiffs and "union" refers to the union plaintiff which sued as a class representative.

detail in the court of appeals' opinion. The court of appeals reviewed the record and determined that the district court's findings of fact were not clearly erroneous.

Petitioners also claimed that, even though they were probationary employees, they were entitled to a hearing upon request before respondents could decide not to renew their contracts. The district court did not reach this issue since the hearing before it, which was expedited at petitioners' request, satisfied any procedural due process rights which petitioners may have had. Subsequent to the trial in this case, the Court of Appeals for the Seventh Circuit decided in another case that probationary instructors were entitled to hearings upon contract nonrenewal. *Roth* v. *Board of Regents of State Colleges,* 446 F.2d 806 (7th Cir. 1971). On appeal in the instant case, the seventh circuit held that, in pre-*Roth* cases, a district court hearing satisfied the requirements of its decision in *Roth.* This Court recently reversed the *Roth* decision. *Board of Regents of State College* v. *Roth*, No. 71-162, 40 U.S.L.W. 5079 (U.S. June 29, 1972).

Prior to the hearing, respondents moved pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure for a class action determination with respect to the union which had purported to bring the action on behalf of all faculty members of the College, most of whom were not members of the union and only nine of whom, like petitioners, were probationary instructors not reemployed beyond the academic year 1970-71. The district court held that the union failed to satisfy its burden of showing that the prerequisites of a class action were met and the court of appeals agreed.

The judgment of the district court was unanimously affirmed in its entirety by the court of appeals on March 9, 1972.

REASONS FOR DENYING THE WRIT

As shown by the discussion which follows, none of the reasons meriting review on certiorari is presented by the instant petition. The only substantial federal question arguably presented has already been resolved by this Court in another case decided subsequent to the filing of the petition. The petition poses no question concerning which lower courts are in conflict or which involves a conflict with a decision of this Court.

I.

PETITIONERS' PRINCIPAL CONTENTION WAS RECENTLY REJECTED BY THIS COURT IN BOARD OF REGENTS v. ROTH.

The petition appears to contend that the principal issue in this case is whether probationary instructors who concededly have no state law right to reemployment nevertheless are entitled to a hearing prior to contract nonrenewal. This issue was raised by petitioners in a motion for summary judgment. However, the district court was not required to decide the issue because, at petitioners' instance, it held an expedited hearing at which, having heard the reasons for respondents' decision not to renew petitioners' contracts, the court found that the decision was not in retaliation for their exercise of first amendment rights.

Even though the court of appeals, subsequent to the trial, held in its decision in *Roth* v. *Board of Regents of State Colleges,* 446 F.2d 806 (7th Cir. 1972), that probationary instructors were entitled to hearings prior to contract nonrenewal, it agreed that there was no purpose to send the case back to the College for another hearing.

In any event, this Court in *Board of Regents of State Colleges* v. *Roth*, No. 71-162, 40 U.S.L.W. 5079 (U.S. June 29, 1972) held that a motion for summary judgment substantially identical to petitioners' motion should have been denied by the district court, stating "the respondent . . . did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." (Slip opinion at 13-14.) The right to reemployment of petitioners under the law of Illinois was identical to that of the teacher in *Roth, i.e.,* no ". . . state statute or University rule or policy . . . secured . . . [their] interest in re-employment or . . . created any legitimate claim to it." (Slip opinion at 13.)

Therefore, even if the district court had ruled on petitioners' motion for summary judgment, it would have been required to deny the motion.

II.

THERE IS NO NEED FOR THIS COURT TO REVIEW THE DISTRICT COURT'S FINDINGS OF FACT WHICH WERE UNANIMOUSLY UPHELD BY THE COURT OF APPEALS.

Unlike *Roth,* where no hearing had yet been held on the instructor's claim of denial of first amendment rights, in the instant case a hearing was held in the district court on these allegations. The hearing lasted four days. Petitioners called several witnesses in their behalf and testified themselves. Each individual respondent took the stand and was cross-examined by petitioners' counsel. The district court heard one-half day of oral argument. The district court found that petitioners had not shown by a preponderance of the evidence that respondents were in any way influenced by petitioners' union membership or speech activities.

The court of appeals reviewed the 839 page transcript and unanimously held that the district court's findings of fact were not clearly erroneous.

Another review by this Court is unnecessary.

III.

THE CLASS ACTION DETERMINATION DOES NOT RAISE ANY SUBSTANTIAL QUESTION.

There is no dispute that a voluntary organization such as the union may seek declaratory or injunctive relief in its own behalf in proper cases. Indeed, as petitioners point out at page 18 of the petition, the seventh circuit, which affirmed the dismissal of the union, has so indicated. *Adams* v. *City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961). See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). Petitioners point out that several circuits considering the issue are in agreement with the seventh circuit.

Here, however, the union did not sue on its own behalf. Instead, it sued as a class representative on behalf of all faculty members at the College, most of whom were not members of the union and only nine of whom were probationary instructors at the College whose contracts were not renewed beyond the academic year 1970-71. Clearly, none of the prerequisites of a class action under Rule 23(a) of the Federal Rules of Civil Procedure was met.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT E. JENNER, JR.
CHESTER T. KAMIN
RICHARD T. FRANCH
Attorneys for Respondents

Of counsel:
JENNER & BLOCK
135 S. LaSalle St.
Chicago, Ill. 60603
(312) 641-6060